UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 167

Docket No. SF-0353-09-0548-I-2

Manuel C. Carlos,

Appellant,

v.

United States Postal Service,

Agency.

August 18, 2010

Manuel C. Carlos, Granada Hills, California, pro se.

Afshin Miraly, Esquire, and Heather M. Peck, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that denied his request for restoration as a partially recovered employee. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is employed as a Mail Processing Clerk at the agency's Processing and Distribution Center in Pasadena, California. Initial Appeal File (IAF), Tab 6 at 32. In September 1997, he suffered an injury that was accepted for compensation by the Department of Labor, Office of Workers' Compensation Programs (OWCP). *Id.* at 33. Effective March 4, 2008, the appellant accepted a modified assignment with duties within his medical restrictions. *Id.* at 35. On April 8, 2009, the agency informed the appellant that in accordance with the second phase of its National Reassessment Process (NRP), it had searched for operationally necessary tasks meeting his medical restrictions within his regular hours of duty and his facility, but that it was unable to identify any such tasks. IAF, Tab 1 at 2. The agency directed the appellant to leave work for the remainder of the day, and informed him that his options were to apply for Continuation of Pay (if eligible), leave, or leave without pay-injured on duty. *Id.*

¶3 The appellant filed a restoration appeal at the Board on May 8, 2009. IAF, Tab 1. He alleged that the agency had violated the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 5. He requested that he be returned to his prior assignment. *Id.* The administrative judge found that the appellant had established jurisdiction over his restoration appeal, and therefore scheduled the appellant's requested hearing. IAF, Tab 14 at 1-3. At the appellant's request, the administrative judge dismissed the appeal without prejudice to refiling in order to permit the appellant to seek new counsel. IAF, Tab 24.

¶4 The appellant, acting pro se, refiled his appeal and withdrew his hearing request. Refiled Appeal File (RAF), Tab 1. The administrative judge therefore issued an initial decision on the written record. *Id.*, Tab 5. He found that the appellant was not entitled to corrective action because he failed to establish that the agency acted arbitrarily or capriciously in denying his request for restoration. *Id.* at 6-8. He also found that the appellant failed to prove his affirmative defense of disability discrimination. *Id.* at 9-10.

¶5 The appellant has filed a timely petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. He argues that the agency acted arbitrarily and capriciously by failing to search elsewhere in the commuting area for available work.[1] *Id.* at 3. The agency has not responded to the petition for review.

ANALYSIS

Restoration to Duty

¶6 The Federal Employees' Compensation Act and its implementing regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. 5 U.S.C. § 8151; *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1015 (Fed. Cir. 2002); *Tat v. U.S. Postal Service*, 109 M.S.P.R. 562, ¶ 9 (2008). In the case of a partially recovered employee, i.e., one who cannot resume the full range of regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within his medical restrictions and within the local commuting area. *Delalat v. Department of the Air Force*, 103 M.S.P.R. 448, ¶ 17 (2006); 5 C.F.R. §§ 353.102, 353.301(d). "An individual who is partially recovered from a compensable injury may appeal to the MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration." 5 C.F.R. § 353.304(c). Discontinuation of a limited duty position may constitute a denial of restoration for purposes of Board jurisdiction

[1] The appellant also argues that the administrative judge incorrectly determined that the Board lacks jurisdiction over his appeal. PFR File, Tab 1 at 3. However, as noted above, the administrative judge found that the Board does have jurisdiction over the appeal. IAF, Tab 14 at 1-3.

under 5 C.F.R. part 353. *Brehmer v. U.S. Postal Service*, 106 M.S.P.R. 463, ¶ 9 (2007).

¶7 To establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must make a nonfrivolous allegation that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of him; (3) the agency denied his request for restoration; and (4) the agency's denial was "arbitrary and capricious." *Chen v. U.S. Postal Service*, 97 M.S.P.R. 527, ¶ 13 (2004); *see* 5 C.F.R. § 353.304(c). The appellant bears the burden of proving the merits of his restoration claim, i.e., all four of the above elements, by a preponderance of the evidence. *Smith v. U.S. Postal Service*, 113 M.S.P.R. 1, ¶¶ 5-6 (2009) (citing *Hardy v. U.S. Postal Service*, 104 M.S.P.R. 387, ¶ 17, *aff'd*, 250 F. App'x 332 (Fed. Cir. 2007)); *Chen*, 97 M.S.P.R. 527, ¶ 18.

¶8 The administrative judge did not make specific findings as to whether the appellant established the first three elements of his restoration claim by a preponderance of the evidence. It is undisputed that the appellant was absent from his position due to a compensable injury, and that he recovered sufficiently to return to duty in a position with less demanding physical requirements than those previously required of him. IAF, Tab 6 at 33, 35. We find that the agency's termination of the appellant's limited duty assignment constitutes a denial of restoration. *See Brehmer*, 106 M.S.P.R. 463, ¶ 9. We are remanding for additional evidence as to the fourth element of the restoration claim, i.e., whether the agency's action was arbitrary and capricious.

¶9 As previously stated, the restoration regulations provide that an agency must make every effort to restore an individual who has partially recovered from a compensable injury and who is able to return to limited duty in the local commuting area. 5 C.F.R. § 353.301(d). The Board has interpreted this regulation as requiring agencies to search within the local commuting area for

vacant positions to which an agency can restore a partially recovered employee and to consider the employee for any such vacancies. *See Sapp v. U.S. Postal Service*, 73 M.S.P.R. 189, 193-94 (1997); *see also Urena v. U.S. Postal Service*, 113 M.S.P.R. 6, ¶ 13 (2009) (evidence that the agency failed to search the commuting area as required by 5 C.F.R. § 353.301(d) constitutes a nonfrivolous allegation that the agency acted arbitrarily and capriciously in denying restoration); *Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12, ¶ 7 (2009) (same).

¶10 "For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station." *Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 9 (1999). The question of what constitutes a local commuting area is one of fact. A determination as to the extent of a commuting area should take into account the totality of the circumstances, including factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. *See Beardmore v. Department of Agriculture*, 761 F.2d 677, 678 (Fed. Cir. 1985).

¶11 The initial decision finds that the agency established that it searched the commuting area for available work by showing that it searched facilities within the Sierra Coastal District within 50 miles. RAF, Tab 5 at 8. However, the initial decision does not include a specific finding defining the local commuting area relevant to the appellant's restoration claim. Therefore, we are remanding the appeal for supplemental proceedings and issuance of a new initial decision. On remand, the administrative judge shall oversee further development of the record by the parties on this issue, including an opportunity for discovery by the parties. *See Sanchez v. U.S. Postal Service*, 2010 MSPB 121, ¶ 15; *Sapp*, 73 M.S.P.R. at 193-94 (remanding the appeal for further development of the record

on what constituted the local commuting area and whether the agency's job search properly encompassed that area).

Disability Discrimination

¶12 When an appellant raises a claim of disability discrimination in connection with an otherwise appealable action, the Board generally has jurisdiction to decide both the discrimination issue and the appealable action. 5 U.S.C. § 7702(a)(1); *Hardy*, 104 M.S.P.R. 387, ¶ 29. In this case, however, the agency argued that the appellant's disability discrimination claim is covered under *McConnell v. Potter*, EEOC Hearing No. 520-2008-00053X (May 30, 2008), a class complaint pending before the Equal Employment Opportunity Commission (EEOC). IAF, Tab 6 at 3-5. Specifically, the agency argued that the appellant fits the definition of a *McConnell* class member,[2] the appellant cannot opt out of the class, and the appellant should therefore be deemed to have made a binding election to proceed with his claim through the equal employment opportunity (EEO) process rather than through the Board. *Id*.

¶13 We find the agency's argument unpersuasive because it presumes that *McConnell* is a mixed case, which it is not. *See Hay v. U.S. Postal Service*, 106 M.S.P.R. 151, ¶ 13 (2007) (an individual who claims prohibited discrimination in connection with an action otherwise appealable to the Board, i.e., a mixed case, may pursue his claim by filing an appeal with the Board or an EEO complaint with his employing agency, but not both); 29 C.F.R. § 1614.302(b) (same).

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[2] The EEOC administrative judge recommended defining the *McConnell* class as "[a]ll permanent rehabilitation employees and limited duty employees at the Agency who have been subjected to the NRP from May 5, 2006 to the present, allegedly in violation of the Rehabilitation Act of 1973." *McConnell*, EEOC Hearing No. 520-2008-00053X at 23 (footnote omitted). (A copy of this notice is included in the record at IAF, Tab 6, Exhibit I.) During the pendency of the appellant's petition for review, the EEOC Office of Federal Operations issued a decision certifying the class as defined in the administrative judge's recommended decision. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 at *9-*10 (Jan. 14, 2010); *see generally* 29 C.F.R. §§ 1614.204, .403-.405.

Nothing in the EEOC's certification of the class complaint discusses denial of restoration or any other action that may be otherwise appealable to the Board. *McConnell v. Potter*, EEOC DOC 0720080054, 2010 WL 332083 (Jan. 14, 2010). Nor do the claims at issue in *McConnell*, as defined by the EEOC, encompass any such action.[3] *Id*. at *9. Furthermore, the EEOC is not processing *McConnell* as a mixed case. Upon certifying the *McConnell* class, the EEOC remanded the matter for a hearing before an administrative judge. *Id*. at *10. If *McConnell* were a mixed case, the EEOC would have remanded the matter for further proceedings before the agency without a hearing. *Compare* 29 C.F.R. § 1614.108(f) *with* 29 C.F.R. § 1614.302(d); *see also Throckmorton v. Norton*, EEOC DOC 01A03994, 2003 WL 21145345, *5 (May 6, 2003) (mixed case class complaints are processed the same as mixed case individual complaints). We therefore find that the appellant's alleged membership in the *McConnell* class does not divest the Board of jurisdiction over any aspect of his Board appeal. *Luna v. U.S. Postal Service*, 114 M.S.P.R. 273, ¶¶ 14-15 (2010); *see Coleman v. Department of the Treasury*, 22 M.S.P.R. 519, 520-21 (1984) (because the appellant's EEO complaint did not pertain to any action appealable to the Board, it was not a mixed case complaint sufficient to divest the Board of jurisdiction over the appeal under 5 U.S.C. § 7702(a)(2)).

¶14 We note that the appellant's petition for review did not allege any error by the administrative judge in adjudication of his claim of disability discrimination under the Rehabilitation Act of 1973. As discussed in *Sanchez*, the reassignment obligation under the Rehabilitation Act, which mandates reasonable accommodation for persons with disabilities, is not necessarily confined geographically to the local commuting area. 2010 MSPB 121, ¶ 18. However,

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[3] The claims at issue in *McConnell* are: (1) The NRP fails to provide a reasonable accommodation; (2) the NRP wrongfully discloses medical information; (3) the NRP creates a hostile work environment; and (4) the NRP has an adverse impact on disabled employees. *McConnell*, 2010 WL 332083 at *9.

because the appellant's petition for review does not address his disability discrimination claim, the supplemental proceedings on remand need not address this claim further.[4]

ORDER

¶15 Accordingly, we remand the appeal to the Western Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

[4] We note that, under mixed case procedures, the appellant will still have an opportunity to raise his discrimination claim before the EEOC after the Board issues its final decision in this appeal. 5 U.S.C. § 7702(b).